SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

October Term, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

In the Matter of

GEORGE CAMPBELL PAINTING CORP.,

Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Appellees.

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

The Motion

Appellees' motion to dismiss or affirm proceeds on four grounds. They claim that:

(a) The Appellant's challenge to the constitutional validity of New York State's Public Authorities Law

§2601 et seq. was not passed upon nor timely or properly raised in the state court.

(b) An adequate non-federal basis supports the judgment;

(c) The federal questions are not substantial or, in any event, were correctly decided; and

(d) The determinations are not final.

The Attorney General's motion adds the claim that Appellant has no standing to challenge the validity of the statute that authorized and compelled its disqualification.

ARGUMENT

I

The constitutional questions were raised, decided by the New York Court of Appeals and were the only grounds of its decision.

Insofar as Appellees' motion rests on a claim that the constitutional questions were neither passed upon nor timely or properly raised, and that a non-federal ground actually formed an independent basis for the state court's decision, it is thoroughly frivolous.

One glance at the Records on Appeal shows the formal appearance of the New York State Attorney General pursuant to Executive Law §71. That statute (McKinney's Consolidated Laws of New York, Book 18, p. 41) reads:

"§71. Attorney-general to appear in cases involving the constitutionality of an act of the legislature

"Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question, to serve notice thereof on the attorney-general and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute."

The Attorney General appeared in both the Appellate Division and the Court of Appeals solely in response to the attack by Appellant on the constitutional validity of the Public Authorities Law. Plainly, the constitutional questions were raised.

Moreover, it is well settled that

"Where it appears from the opinion of the state court of last resort that a state statute was drawn in question as repugnant to the constitution and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of validity of the statute was raised when such question appears to have been actually considered and decided by the court." *Charleston Fed. Sav. & L. Asso.* v. *Alderson,* 324 U.S. 182, 185-6, 89 L. ed. 857, 861, 65 S. Ct. 624 (1945).

Here, the court's opinion shows clearly that the constitutional validity of the statute was drawn in question and upheld (J.S. pp. 18-23).*

In *Herb* v. *Pitcairn,* 324 U.S. 117, 89 L. ed. 789, 65 S. Ct. 459 (1945), jurisdiction was sustained where the state court's decision was only relevant upon the assumption that the federal question was considered.

In *New York ex rel. Bryant* v. *Zimmerman,* 278 U.S. 63, 73 L. ed. 184, 49 S. Ct. 61 (1928), jurisdiction was upheld where, from the state court's opinion and its citations, it was obvious that a federal constitutional question was involved even though the opinion did not specifically allude to any portion of the federal constitution.

Appellees claim, that the Court of Appeals ruled specifically on contractual and non-constitutional grounds, is refuted by the Court's own opinion (J.S. pp. 18-23). But, the claim is especially surprising in view of the fact that Appellees and the Attorney General both abandoned this so-called contract theory during oral argument to the Court of Appeals.

There appears in the Appendix to this brief a certified transcript of the oral arguments presented to the Court of Appeals by Appellees and the Attorney General.

Paul W. Hessel, Esq., "of counsel" to the attorney for Appellees, had the following colloquy with the Court:

> "Van Voorhis, J.: The argument that they signed the contract and agreed to this voluntarily is, I suppose, subject to whether the clause is illegal or not.

* Reference to the Appellant's Jurisdictional Statement will be J.S. p.

"Mr. Hessel: I agree with that, your Honor—I'll agree to that. In fact, I may say that my opponent—

"Van Voorhis, J.: By legal I mean constitutional." (App. p. 8a)*

• • •

"Van Voorhis, J.: Suppose this statute is contrary to the constitution, then you say it becomes valid because the contract was voluntarily signed and it didn't have to be—

"Mr. Hessel: No, I'm not saying that, your Honor,

"Van Voorhis, J.: Doesn't it add up to that?

"Mr. Hessel: What I'm saying is that this statute, like the statutes which provide for discharge of public employees in the event of their failure to testify as to the narrow questions relating to their employment, is just as valid with respect to the qualifications of a contractor for public work, as it would be under Justice Fortas' decision which was referred to by Judge Fuld, in connection with a public employee. In fact, I should like to refer to a statement to that effect in People v. Crane, where Judge Cardozo equated contractors and all persons doing public employment, with public employees—and by leave of the Court I would just like to read a few sentences from that statement.

"Chief Judge Fuld: What's the citation?

"Mr. Hessel: People vs. Crane, 214 N.Y. 154, 166-167. Now this is particularly relevant with Justice Fortas' concurring opinion in the Spevack case.

"Van Voorhis, J.: Excuse me for just a second—I don't want to divert you any further—Cardozo also wrote in Campbell vs. City of New York, didn't he?

"Mr. Hessel: That's right.

"Van Voorhis, J.: He said the same thing, but qualified it—"If the constitution does not make it illegal to place this promise in the contract, the claimants may not be heard to insist—"

* Reference to the appendix to this brief will be App. p. .

"Mr. Hessel: I agree.

"Van Voorhis, J.: Now, isn't that a qualification of this—doesn't it go to the point—I'm not suggesting whether this statute is valid or not—but isn't the question here whether it's valid or not, not whether it's a signed contract?

"Mr. Hessel: I agree basically that that's the question.

"Chief Judge Fuld: You're willing to stand, are you not, on the constitutionality of the statute? If it's constitutional, you're in safe waters but if it's unconstitutional you agree—

"Mr. Hessel: I must agree—

"Chief Judge Fuld: And there's no other argument—

"Mr. Hessel: No. We would have no right to insert in the contract a provision—

"Chief Judge Fuld: So you don't rely on—

"Mr. Hessel: —the constitution prohibits. Under the statute—

"Chief Judge Fuld: Excuse me Mr. Hessel. You are saying that if we find it unconstitutional, the statute, that's the end of the case, isn't it?

"Mr. Hessel: I would have to agree." (App. pp. 9a-11a)

And, Samuel A. Hirshowitz, Esq., First Assistant Attorney General, appearing "of counsel" to the Attorney General of the State of New York, agreed with the court as follows:

"Van Voorhis, J.: If the statute which mandated the waiver were void, that would be decisive, wouldn't it. If the statute is valid, there's nothing to it, it's all right; if the statute is invalid then the result comes out the other way, doesn't it?

"Mr. Hirshowitz: If the statute is invalid, of course that's the end of the case, but you have a middle

point here. Supposing a statute is valid, and what's really involved in this case is an argument that you couldn't coerce Campbell into waiving immunity. That's not the question of the validity of the statute." (App. pp. 26a-27a)

The court also decided the second constitutional question presented to it by the Appellant. It held that Appellant's vicarious disqualification caused by the acts of a non-controlling former officer and director did not violate the due process clause of the Fourteenth Amendment, because the statute provided a procedure for discretionary reinstatement which it deemed an adequate and exclusive safeguard against arbitrary, mistaken or unfair disqualification (J.S. p. 19).

Thus, it is obvious that the constitutional questions were properly raised, considered and were the sole questions involved in the court's decision upholding the validity of the state statute.

II

The judgments cannot be supported by independent non-constitutional grounds.

Appellees and the Attorney General contend that Appellant's disqualification is independently supported by contractual provisions regardless of the validity of the statute that mandates their insertion in all public contracts.

This argument, aside from having been abandoned during the oral argument, is indefensible in the face of the well established precedent.

The argument has been phrased in syllogistic terms as follows:

> "* * * if the legislature may withhold a particular benefit, it may grant it in a limited form since the greater power of withholding absolutely must necessarily include the lesser power of granting with restrictions. As a corollary to this argument, the contention is made that the recipient of the benefit is not deprived of a right since he may retain it simply by rejecting the proffered benefit" (Footnotes omitted) *Unconstitutional Conditions,* Note, 73 Harv. L. Rev. 1595, 1596 (1959).

This "logic" has been rejected by courts and its mischief exposed by numerous commentators.

> "The potential erosion of fundamental liberties through the use of this bargaining technique has prompted the development of the doctrine of 'unconstitutional conditions.'" 73 Harv. L. Rev. at p. 1596.

Accord, Willcox, *Invasions of the First Amendment Through Conditional Public Spending,* 41 Cornell L.Q. 12 (1955); Hale, *Unconstitutional Conditions and Constitutional Rights,* 35 Colum. L. Rev. 321 (1935); Merrill, *Unconstitutional Conditions,* 77 U. of Pa. L. Rev. 879 (1929); Thomas Reed Powell, *The Right to Work for the State,* 16 Colum. L. Rev. 99 (1916).

The doctrine of unconstitutional conditions forbids the government's exacting a waiver of important constitutional rights as a condition of its granting a benefit or privilege even though it might not be required to grant any benefit or privilege at all.

This Court stated the doctrine in *Frost* v. *Railroad Commission,* 271 U.S. 583, 593-4, 70 L. ed. 1101, 1102-5, 46 S. Ct. 605 (1926):

> "It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and *one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.*" (Emphasis added.)

Accord, *Sioux Remedy Co.* v. *Cope,* 235 U.S. 197, 59 L. ed. 193, 35 S. Ct. 57 (1914) (statute which forbade use of state courts to foreign corporations unless they subjected themselves to the general jurisdiction of the state by the appointment of a resident agent held to violate the Commerce Clause); *Western Union Tel. Co.* v. *Kansas,* 216 U.S. 1, 54 L. ed. 355, 30 S. Ct. 190 (1910) (excessive tax imposed as a condition of doing business by foreign corporation held to violate the due process and commerce clauses); *Terral* v. *Burke Const. Co.,* 257 U.S. 529, 66 L. ed. 352, 42 S. Ct. 93 (1922) (doing business conditioned on agreement not to remove cases to Federal Courts held to violate Article 3).

Clearly, the contract provisions mandated by statute as a condition of doing business with any public body is not independent of the statute.

III

The judgments appealed from are final.

Appellant's complaint and its petition have both been dismissed. No further state court proceedings either by way of review or otherwise are available in these cases. Consequently, these are final judgments. See Annotation: "When judgment of state court in civil cases is final for purpose of review by Supreme Court of United States". 97 L. ed. 208.

A proceeding for reinstatement, like the possibility of a Governor's pardon for a convict, does not make the disqualification any the less final. As this Court noted in *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, 159, 95 L. ed. 817, 847, 71 S. Ct. 624 (1951):

> "No lack of finality can be urged. Designation works an immediate substantial harm to the reputations of petitioners."

Appellant claims an absolute right not to have been disqualified under a statute that is unconstitutional. The procedure for reinstatement may have some bearing on whether the statute satisfies due process, but it cannot save the statute from the charge of invalidity as impairing the privilege against self-incrimination.

It falls short even as to due process. It is clear that §2603 was designed for the relief of the public to insure the availability of vital goods and services. It was not designed to cure unfairness to the disqualified company. The refusing officer had completely severed his connec-

tion with Appellant, and everyone else connected with Appellant had cooperated, i.e., agreed to testify. The only other factor in a §2603 proceeding is a rather nebulous notion of public interest. A company unlike General Electric or Westinghouse necessarily is hard pressed to show that the public interest requires reinstatement. Thus it is not a suitable cure for arbitrary or unfair conduct.

IV

Appellant has standing to object to the statute pursuant to which it was disqualified.

Appellant was disqualified because one of its former officers refused to waive his privilege against self-incrimination.

The Attorney General argues that Appellant may not be heard to complain and that only the former officer has standing to object. He thus likens Appellant to the *pruegelknabe* installed by the old Kings of Germany to receive the beating whenever the Prince misbehaved.

The answer to the Attorney General's contention is found in the Supreme Court's decisions in *Pierce* v. *Society of Sisters,* 268 U. S. 510, 69 L. ed. 1070 (1925) and *Joint Anti-Fascist Refugee Comm.* v. *McGrath, supra.*

In *Pierce,* the court said at 268 U. S. 535:

> "Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the 14th Amendment guarantees. Accepted in the proper sense, this is true. Northwestern Nat. L.

Ins. Co. v. Riggs, 203 U. S. 243, 255, 51 L. ed. 168, 173, 27 Sup. Ct. Rep. 126, 7 Ann. Cas. 1104; Western Turf Asso. v. Greenberg, 204 U. S. 359, 363, 51 L. ed. 520, 522, 27 Sup. Ct. Rep. 384. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 27 A.L.R. 375, 42 Sup. Ct. Rep. 124; Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255, 44 Sup. Ct. Rep. 15."

Indeed, the concurring opinion of Justice Jackson in the *McGrath* case is very relevant here. He said:

> "The Government proceeds on the basis that each of these associations is so identical with its members that the subversive purpose and intents of the one may be attributed to and made conclusive upon the other. Having adopted this procedure in the Executive Department, I think the Government can hardly ask the Judicial Department to deny the standing of the organizations to vindicate its members' rights." (341 U. S. at p. 187)

It is patently absurd to suppose that a corporation has no standing to challenge the validity of a statutory penalty imposed against it.

Conclusion

For the reasons stated above it is respectfully submitted that the motions to dismiss or affirm should be denied.

Respectfully submitted,

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Transcript of Oral Argument

STATE OF NEW YORK

COURT OF APPEALS

CLERK'S OFFICE

I, RAYMOND J. CANNON, Clerk of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed transcript with the tape recording of the argument in the case identified thereon and that the same is a true and correct transcript.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the City of Albany, this Third day of November, A.D., 1967.

RAYMOND J. CANNON
Clerk

[SEAL]

Appendix—Transcript of Oral Argument

In the Matter of

The Application of GEORGE CAMPBELL PAINTING CORP.,
Appellant,

vs.

WILLIAM REID, & ors., &c., & ano.,
Respondents,

For a Review &c.

GEORGE CAMPBELL PAINTING CORP.,
Appellant,

vs.

WILLIAM REID, & ors., &c., & ano.,
Respondents.

The following is the unofficial transcription, taken from a tape recording made of all arguments in the Court of Appeals, of a part of the oral arguments presented in the above-entitled causes before the New York State Court of Appeals on May 15, 1967, and the whole of the arguments made by Paul W. Hessel, Esq., counsel for the respondents, and by Samuel A. Hirshowitz, Esq., Assistant Attorney General of the State of New York, in support of the constitutionality of the statute involved.

"Chief Judge Fuld: Both these cases involve the same points, don't they?

Mr. Hessel: Yes, your Honor.

Chief Judge: The same arguments apply to and are dispositive of both?

Hessel: Yes, your Honor. I haven't dealt with the procedural aspects which have been raised because I believe that section 103-c of the CPLR is completely dispositive of that.

Hessel: May it please the Court—

Chief Judge: Is someone else speaking on your behalf —on your side? Is some other lawyer talking on your—

Hessel: No, your Honor, only the Attorney General, who will address himself to the question of the constitutionality of the statute. While I have made some references to that in a portion of my brief, at the same time I'll leave that argument on the statute to the Attorney General and address myself to the question of constitutionality vis-a-vis this contract which is the basis of the decision of the courts below. In answer to your last question, your Honor, both of these, both this Article 78 proceeding and this plenary action for an injunction, seek exactly the same relief and are decisive on the same set of facts. That is one of the reasons why, in the court below, we raised the question of a pending action—because the Article 78 proceeding was then on appeal. Judge Schweitzer had originally decided that he would stay the plenary action pending the determination of the appeal and the Appellate Division then modified and dismissed it. Now I agree substantially with my worthy opponent on the recital as to the proceedings in the courts below. However, I should like to highlight some additional facts that I think were omitted. In answer to the question as to the nature of the indictment,

there are three contracts that are involved here, all of them signed by George Campbell, Jr., as president of the appellant corporation. The indictment itself is made part of the record—page 66 to 69—of the plenary action. The indictment is based upon three counts of perjury committed by both George Campbell, Jr., and the corporation in falsely swearing that they did not, in connection with the submission of the bids—and this is an affidavit contained in the actual bids—in falsely swearing that they did not collusively prepare their bids in conjunction with other contractors. Now, a fact that I think should be brought to the attention of the Court is this: that it should be clearly understood that the record—that so far as the record is concerned, no constitutional question of any nature was proposed or raised or propounded of that nature. For the first time—when this case went to the Appellate Division is when constitutional questions were raised. I'm not going to address myself to any technical objections as to whether this Court will entertain consideration of a constitutional question if it's not in the record; I'd just as soon get to the merits.

Chief Judge: We agree to entertain it.

Hessel: Well, the point is important because of the manner in which they sought to avoid the penalty or the sanction which was provided for in this contract, a contractual obligation, which they as well as all other bidders assumed, in entering into these contracts, in my opinion precludes them now from raising a constitutional question with respect to this appellant, because all that they did at the time they were faced with the certainty that this sanc-

tion would be invoked under the terms of the contract, was to try to avoid it by a device which no one of the other fourteen or fifteen contractors who were similarly disqualified under the same contract provisions, even attempted, and that was—and I think it is very clear in the record and I don't think my opponent will deny it—it was in contemplation of George Campbell, Jr., being called before the grand jury—knowing he would be called, in fact, after a conversation with the District Attorney to that effect and on the advice of counsel, that he not only resigned as an officer and director, but he gave up all of his stock and every financial interest in this corporation whatsoever. So at the time he was called upon to waive immunity and testify before the grand jury, this was the result, by their own action. George Campbell, Jr., was then, on April 14th, when he was called before the Grand Jury, a stranger to this corporation. He was not an officer, he was not a director; he was not a stockholder; he had divorced himself from all financial interest. So that any compulsion upon him, when he was required to waive immunity, any requirement that he waive the Fifth Amendment, was one that he had complete choice either to adhere to or deny or to reject, but there was no economic sanction possible against him, because he had no interest in this corporation. As far as the corporation was concerned, they had no personal relationship with George Campbell, Jr., so that they could on his behalf invoke the constitutional issue. More than that, the New York City Housing Authority is a public corporation and it operates under the Public Housing Law. Like any other corporation, it has certain rights

and privileges and obligations. So far as its right to contract is concerned, it has substantially all of the same rights as any private corporation, with certain limitations. In fact, the statute, the Public Housing Law, says that the New York City Housing Authority may make and execute contracts and other instruments necessary and convenient to the exercise of its powers, the same as a private corporation. But, further than that, these contracts may be in such form and contain such terms and provisions as may be deemed advisable by the Authority. But there is something else in the Public Housing Law that I think merits very serious attention. While, of course, it is probably inherent in every public agency to accept or reject the contractor upon a determination as to whether he is responsible or not, whether financially, morally or otherwise, the public housing law makes it very clear that so far as a housing authority is concerned, an authority may make rules and regulations governing the qualifications of bidders. I ask the Court to keep that in mind with respect to the further arguments I make. Now, our position is, if the Court please, that whether there had been a statute or not, under the rights granted to it under the Public Housing Law and its inherent rights as a corporation, public or private, this authority could have provided in its contract the provisions set forth in section 38 which is the critical provision of these contracts in issue here. Not only that, but in writing those provisions, it specifically provided for a disqualification under certain conditions, and conversely that means a qualification, rule or regulation within the purview of the Public Housing Law.

Van Voorhis, J.: But was there any voluntary choice here upon the part of the contractor?

Mr. Hessel: I say there was, your Honor. Because it applied not only to this contractor but to all contractors.

Van Voorhis, J.: You mean the choice was to bid or not to bid?

Mr. Hessel: To bid or not to bid, and I'm going to refer to cases decided both by this court and elsewhere, which point out—

Van Voorhis, J.: Suppose for example you said the authority could put in the clause even if it weren't in the statute, suppose just in order to take an extreme case, the authority had said in the specifications that contracts could only be made with painters if they would agree to discriminate on a racial basis as to their employees. Would you say that this is a matter of take it or leave it—that the voluntary choice was to enter into such a contract or not to enter into it—and then assuming that that regulation was illegal, that it nevertheless would be binding on them because they assumed it on a voluntary basis?

Mr. Hessel: Your Honor, I'll answer it this way—I would say that would not be proper, it would be illegal. I don't say any right—

Van Voorhis, J.: Well, if this is illegal—don't you say it doesn't matter because they voluntarily agreed to it as part of the contract.

Mr. Hessel: I say by the fact that they voluntarily agreed, this took away the compulsion that they claimed they were under to waive immunity. Of course, in this the individual is the boss but nevertheless—assuming now, this

corporation itself, if a corporation can be compelled to waive immunity—

Van Voorhis, J.: The argument that they signed the contract and agreed to this voluntarily is, I suppose, subject to whether the clause is illegal or not.

Mr. Hessel: I agree with that, your Honor—I'll agree to that. In fact, I may say that my opponent—

Van Voorhis, J.: By legal I mean constitutional.

Mr. Hessel: That's right, constitutional. And really, the only pertinent argument in my opinion that's made with respect to constitutionality here, is what they have labelled their reply brief, which I received only Friday, and from what research I've been able to do on it, I'll give you the answers to that. And that is where they raise the question of the so-called doctrine of unconstitutional condition, and I think that's what your Honor has reference to. While it is, of course, easy to say as was said in the Campbell case which I cited in my brief, decided by this Court, the case of Atkins against the State, it was a Supreme Court case, also cited in the brief, there is broad language to the effect that whether it's a private contract or a public contract, you take it or leave it upon the terms and conditions offered. But in all cases where such a broad brush is used, there are always exceptions and limitations and I'll be the first to agree to that. Even in a private contract, you cannot have matters in there which are against public policy or a violation of statute. The fact that this contract happened to be mandated by a statute, doesn't make it any the less a matter of private contractual agreement—

Van Voorhis, J.: Not if the statute is valid. But if the statute is invalid, then what?

Mr. Hessel: Well, if the statute is invalid? I would say that if the statute mandating it is invalid, then of course the agreement which is in the same terms must necessarily also be found invalid, but when it comes to the question of voluntariness, then I say the fact that it was adopted by private contract is a matter of voluntary action upon the part of the—

Van Voorhis, J.: Even though they couldn't bid at all unless they bid it subject to—subject to, and this is arguendo—an unconstitutional condition?

Mr. Hessel: That's right.

Van Voorhis, J.: I still don't see—according to that then they can only bid if they agree to discriminate racially among employees. You say that would be valid because they voluntarily subscribed to it.

Mr. Hessel: No, I would say that—

Van Voorhis, J.: I don't see how you can escape from that conclusion. I only cite that as an illustration, of course.

Mr. Hessel: Even if this were a private contract and it provided for discrimination which is contrary to law or statute, it would have been invalid. The fact that it—

Van Voorhis, J.: Suppose this statute is contrary to the constitution, then you say it becomes valid because the contract was voluntarily signed and it didn't have to be—

Mr. Hessel: No, I'm not saying that, your Honor.

Van Voorhis, J.: Doesn't it add up to that?

Mr. Hessel: What I'm saying is that this statute, like the statutes which provide for discharge of pubilc employ-

ees in the event of their failure to testify as to the narrow questions relating to their employment, is just as valid with respect to the qualifications of a contractor for public work, as it would be under Justice Fortas' decision which was referred to by Judge Fuld, in connection with a public employee. In fact, I should like to refer to a statement to that effect in People v. Crane, where Judge Cardozo equated contractors and all persons doing public employment, with public employees—and by leave of the Court I would just like to read a few sentences from that statement.

Chief Judge Fuld: What's the citation?

Mr. Hessel: People vs. Crane, 214 N.Y. 154, 166-167. Now this is particularly relevant with Justice Fortas' concurring opinion in the Spevack case.

Van Voorhis, J.: Excuse me for just a second—I don't want to divert you any further—Cardozo also wrote in Campbell vs. City of New York, didn't he?

Mr. Hessel: That's right.

Van Voorhis, J.: He said the same thing, but qualified it—"If the constitution does not make it illegal to place this promise in the contract, the claimants may not be heard to insist—"

Mr. Hessel: I agree.

Van Voorhis, J.: Now, isn't that a qualification of this —doesn't it go to the point—I'm not suggesting whether this statute is valid or not—but isn't the question here whether it's valid or not, not whether it's a signed contract?

Mr. Hessel: I agree basically that that's the question.

Chief Judge Fuld: You're willing to stand, are you not, on the constitutionality of the statute? If it's constitutional, you're in safe waters but if it's unconstitutional you agree—

Mr. Hessel: I must agree—

Chief Judge Fuld: And there's no other argument—

Mr. Hessel: No. We would have no right to insert in the contract a provision—

Chief Judge Fuld: So you don't rely on—

Mr. Hessel: —the constitution prohibits. Under the statute—

Chief Judge Fuld: Excuse me Mr. Hessel. You are saying that if we find it unconstitutional, the statute, that's the end of the case, isn't it?

Mr. Hessel: I would have to agree.

Chief Judge Fuld: Yes—I think Judge VanVoorhis misunderstood you.

Mr. Hessel: That's right.

Chief Judge Fuld: Or you misunderstood him.

Mr. Hessel: Now is the Court interested in hearing—

Chief Judge Fuld: No.

Mr. Hessel: All right. If the issue of the constitutionality of the statute is properly before the Court, then I'll leave it to the Attorney General to discuss the statute so far as that is concerned. My point with respect to the contract, however, is that in determining the constitutionality of the state, the fact that it provided, not for a statutory imposition directly, or mandate, even, like the statutes with respect to public employees, but has provided for a contractual provision where a voluntary undertaking of such an obligation would be undertaken. That would

in effect be very persuasive on the question whether this contract and the statute are constitutional, particularly under Justice Fortas' distinction, between disbarment of an attorney, who is not a public employee, and a public employee, with whom I say this court itself has equated all public contractors and persons doing public work. Now in the Court below, we devoted our entire consideration and argument to the question of interpretation of both the statute and the contract, and that is as to whether this resignation—assuming the constitutionality because no such question was raised—that is, their claim was that the Authority breached this contract, and you will see by their notice of claim which they were required to file after the dismissal of their first action, that they claim, and the Authority's letter of disqualification so specifies, that this was done under and by virtue of the contract. A claim that the interpretation of the contract should have been such that the resignation of George Campbell just prior to his being called before the Grand Jury forbade the authority from invoking the sanction because he was not an officer at the time that he was so called before the Grand Jury.

Now, on that question of interpretation, the whole case hinged in the Supreme Court. It was the court's decision that that did not preclude—it was not a proper interpretation either of the statute or of the contract. So all that is involved here is interpretation. Now we go further in our opposition to their application. We said, and we say here, that this statute, unlike others, like the public employees' statutes—like section 1123 of the charter which

I think your Honors are going to contend with here on this calendar today—and like section 903 which was before the court in the Slochower case—does not provide that the contractor shall be automaticallly dismissed without any means of relief. There's a section 2603 in this statute, following 2601 and 2602, which gives them not only an administrative right to a hearing and relief from the disqualification or cancellation of this contract, but it gives them judicial relief—

Van Voorhis, J.: What's that hearing on? You can't raise the constitutionality of the statute on such a hearing, can you? It's only on whether you did or did not waive immunity or something of that kind, that could be determined there.

Mr. Hessel: Well, I think I'll agree with the Attorney General and District Attorney who has filed a brief amicus curiae here, that that question on a judicial hearing and any question could be raised but even if the constitutionality itself could not be raised, I say the relief afforded him—the provision that he could go into the Supreme Court within days after his disqualification, obtain a stay and get a full judicial hearing on the propriety of his disqualification—this is a very important—

Van Voorhis, J.: He would go in under the very statute whose constitutionality he disputed, wouldn't he?

Mr. Hessel: I say by virtue of the fact he could obtain relief from that sanction—

Van Voorhis, J.: Could he obtain the relief declaring that the statute which created the hearing was invalid?

Mr. Hessel: Well, I believe in the judicial hearings it could be so determined. But even if it couldn't be so determined, the very fact that he was afforded a summary remedy to avoid, in a proper case, the sanction invoked, would help to sustain the constitutionality of the statute. Now, in the case of public employees, there is no provision for such a hearing, and yet that has been sustained. And Justice Fortas has so said. And in the Slochower case, it was indicated that if the questions had been directed by the Board of Education to his particular work, that it would have been proper to fire him as was done.

Now, one more point I'm going to make, your Honors, and then I'll sit down and let the Attorney General discuss the question of constitutionality. It must be remembered that we have here first a plenary action for an injunction and the other is an Article 78 proceeding for precisely the same relief. Now what do they want to do? They want to enjoin the Authority from disqualifying it for any period at all. They want an immediate injunction to lift the disqualification right now. Now, I have already adverted to the indictment pending against this contractor and George Campbell, Jr., with respect to the very contracts in issue here. It has been decided by the courts of this State that while admitting that an indictment is only an accusation, not a conviction, yet that would probably be taken into consideration in deciding whether a contractor is a responsible or qualified bidder. That's the Cesara case and several other cases that follow it, cited in our brief. Now if that's the case, certainly the court, in equity, would not summarily enjoin the Authority despite the pending indictment and

compel them to do business with a contractor who was under that kind of a cloud. Thank you, your Honors, for your attention. I'll turn it over to the Attorney General.

Samuel A. Hirshowitz, Assistant Attorney General of the State of New York:

Chief Judge Fuld: You don't require all that time to establish the constitutionality of the statute, do you?

Mr. Hirshowitz: No. I don't think so. Let me say first that the same question, involving a parallel statute under the General Municipal Law, is the subject of litigation in the Federal Court in the case of Holland v. Holtsinger, and I spent a full day before a three judge panel with the District Attorney and a corporation counsel arguing the constitutionality of that statute. There's been no decision in that case.

Van Voorhis, J.: I suppose that General Electric, Westinghouse and Allis-Chalmers and the other seventeen electrical equipment companies that were found guilty of price fixing and collusive bidding are precluded by this statute, in the municipalities where this occurred, from putting in any bids?

Mr. Hirshowitz: Well, not by this statute, your Honor, because they weren't parties to any contracts. There was an opinion of the Attorney General a number of years ago—

Van Voorhis, J.: The statute is read into the contract even if they don't write it in, isn't it?

Mr. Hirshowitz: There's no contract with the State or city involved with General Electric or General Motors. The statute merely says that if an officer of the corporation is called before a grand jury and refuses to waive—a lim-

ited waiver of immunity—the contracting agency—in this case the Housing Authority—can disqualify the company or the corporation from bidding for future contracts for the next five years.

Van Voorhis, J.: Apparently, then, it's not disqualified because it's engaged in collusive bidding—it's disqualified because it refused to waive before the grand jury.

Mr. Hirshowitz: No sir. They're disqualified because they refused to furnish the information to the State or city authorities with respect to their performance of the contract.

Van Voorhis, J.: If the information proved to be very damaging, why, then they could still bid.

Mr. Hirshowitz: I didn't get that.

Van Voorhis, J.: If the information as disclosed by the officer testifying before the Grand Jury proved to be very damaging—proved very evil conduct, let us say—then they could still bid, but if they didn't testify and it was—no matter what the conduct was then they—

Mr. Hirshowitz: If the information as disclosed either before the grand jury or before any other investigating agency, or before the purchasing authority itself, proved to be damaging the purchasing agency would have the discretion, as held in a number of cases, not to take the bid because the bidder would be established as being not a responsible person, but that would be entirely apart from this statute.

Van Voorhis, J.: If you had enough of these people who were engaged in collusive bidding, and they're all disqualified, why then I suppose the rest would have a monopoly, is that so?

Mr. Hirshowitz: Well, I can't imagine—take the milk industry which we argued before District Court—there are over 300 milk companies—I can't imagine all the 300 milk companies engaged in collusive bidding—

Van Voorhis, J.: I mean, the operation of this statute depends upon how many contractors there are in the field, I take it. If there aren't very many, why then it couldn't be enforced without having business come to a standstill.

Mr. Hirshowitz: If there weren't many contractors I'm sure that, if a number of bidders were disqualified, other persons would come into that business and bid for the public business.

Van Voorhis, J.: Like General Electric and Westinghouse and Allis-Chalmers.

Mr. Hirshowitz: Well, I don't like to pick General Electric or Westinghouse out for any reason.

Van Voorhis, J.: It wouldn't be so easy for another to go into that—of course, they can go into the painting business—but then I suppose the principle is different depending on whether or not it's possible for a newcomer to establish himself quickly in the business?

Mr. Hirshowitz: We have no investigation of General Electric and therefore they haven't been called before a grand jury, your Honor, and I don't know that any of the officers of General Electric or Westinghouse would refuse to waive if they were called before the grand jury and if they had public contracts.

Van Voorhis, J.: Well, I think they got down on their knees and confessed, as I recall it.

Mr. Hirshowitz: There is another provision in the Public Authorities Law as well as in the other companion statutes, Judge, which was briefly referred to by my associate here from the Housing Authority. The bidder must certify that he or it has not engaged in any collusion—that's, I think, in this law, 2604.

Van Voorhis, J.: Apparently my questions have gone a little afield but I wanted to get a little background or philosophy or thinking on this to try to get at what is essentially involved here.

Mr. Hirshowitz: I just want to repeat before I develop my thoughts, that the disqualification is for failure to furnish information to the Public Authorities on the performance of the particular contract—it doesn't go into any personalities. Did you engage in collusion or bid rigging with reference to the contracts that you signed with, in this case, the Housing Authority?

Keating, J.: There were fourteen or fifteen disqualified here, weren't there?

Mr. Hirshowitz: Yes your Honor.

Keating, J.: Out of how many bidding on the contract?

Mr. Hirshowitz: I don't know, maybe the Housing Authority knows.

Keating, J.: Well, may I ask the attorney for the Housing Authority how many bidders are there in all who were not disqualified?

Mr. Hessel: Well, your Honor, at least twenty or thirty, and since these disqualifications which are, of course, a major matter with the newspapers, you probably had another thirty or forty come into the business. We

just canvassed the whole redbook in all of New York and got plenty of bidders.

Chief Judge Fuld: Will you now confine your argument to the constitutional question?

Mr. Hirshowitz: The problem with respect to one of the questions Judge Van Voorhis asked about this waiver of a constitutional right. Now, the way the case arises causes a little confusion. As my associate pointed out at Special Term, and in the papers that you have before you, no constitutional question at all was raised. Now, like Topsy, the constitutional question has been increasing as we go from court to court. Now in the Appellate Division the major argument of the appellant was—and that's where the contract came in—that since Campbell was no longer an officer of the corporation, when he made the refusal, the corporation was entirely disassociated from his refusal and was innocent of all wrongdoing—

Chief Judge Fuld: This has nothing to do with the constitutionality of the statute—

Mr. Hirshowitz: No, but they said it was unconstitutional—

Chief Judge Fuld: I thought you were limiting yourself—

Mr. Hirshowitz: I'm just trying to explain to Judge Van Voorhis how the Appellate Division decided—that they decided the only question they had before them which was a question of whether it was unconstitutional to bar the corporation when Campbell was no longer an officer. There's been a great deal of discussion—

Van Voorhis, J.: I understand that argument, I'm aware of this.

Mr. Hirshowitz: There's been a great deal of discussion about the Garrity and the Spevack cases. And in all the courts everybody is using the Garrity and Spevack cases. The appellant seems to feel that these cases have completely destroyed the power of the State or the city to demand candor of its public contractors and to refuse to do business with contractors who refuse such candor. Now on the contrary—

Chief Judge Fuld: Can the State take from a party the right to assert a constitutional privilege?

Mr. Hirshowitz: Yes, your Honor. There are cases on that, I'm just going to reach that in a minute—

Chief Judge Fuld: Well, get to that, that's the important point, isn't it?

Mr. Hirshowitz: Yes. I'll reach that. Now, on the contrary, it's our view that these cases have not destroyed that power and haven't undermined the holding in the Laino case and I want to refer to that case very briefly because it went through this court and I'm sure Judge Fuld, you're familiar with it. In that case, an officer of the corporation which held a public contract was indicted for a substantive crime which was disclosed in the course of his testimony before the grand jury, and the case went through the court here and the conviction was affirmed and then Mr. Laino went into the Federal court and sued out a writ of habeas corpus. In his papers he said that he had raised before the trial court the question of the validity of the statute which was 103, I think "b", of the General Municipal Law which is substantially identical with this statute. Judge Feinberg, District Judge Feinberg, heard the writ originally and he sent it back to Judge Fuld for reargu-

ment, to clarify it. Then it came back to the District Court and Judge Kenney wrote a long opinion and he did two things, so far as we're concerned here: He upheld the conviction of Laino—that was number one—but he also answered the argument that the statements made by Laino before the Grand Jury amounted to a coerced confession and therefore were improperly used to convict him. He expressly upheld the validity of the statute—103-b of the General Municipal Law—and in a long opinion he equated the 103-b status of a public contractor with the status of public employee. Since that time, the Garrity case has come along. The Garrity case holds this—if you equate it to the public contractor—it says: the man, who appeared before the Grand Jury on a limited waiver of immunity—in that case a public employee—and makes a statement, cannot be convicted on the basis of that statement, but it also says the statements may be used against him in connection with any disciplinary proceeding, and in this case they can be used against them with reference to determining responsibility and moral worth of the contractor.

Keating, J.: That is, you claim, that anything that he said in this proceeding, elicited by the Housing Authority could not be used in the criminal action.

Mr. Hirshowitz: That appears to be the holding in the Garrity case, your Honor. In this case, however, no such testimony was obtained. Even if Campbell had testified, the corporation could not challenge the use of such testimony since it has no privilege against self-incrimination, and we have a number of cases in our brief on that. Now the appellants in their reply brief pick up old cases decided before 1930, such as referred to by my friend here—the

counsel for the appellant—the Pierce case and the Truax case. They have nothing to do with this case. They involve the question of whether you have standing to bring an action. This is the question—whether you have standing to challenge the use of—the application of the Fifth Amendment. I think more analogous than those cases is a case that I just read—People v. Portelli, 15 NY 2d 235, which was decided by this Court.

Chief Judge Fuld: It has very little to do with this problem.

Mr. Hirshowitz: I know, but the analogy is this, the District Attorney of Kings County successfully contended that a witness who had been coerced into confessing could testify at the trial against his associate in the crime and that the defendant in such case had no standing to bar such confession because of the coercion.

Chief Judge Fuld: I thought you were talking—aren't you going to talk to the constitutionality of the statute?

Mr. Hirshowitz: Yes, your Honor.

Chief Judge Fuld: Your time is almost up—

Mr. Hirshowitz: But I'm also talking on the question of standing, your Honor.

Chief Judge Fuld: Your time is almost up.

Mr. Hirshowitz: In the Garrity case there were five judges for the majority and four dissenters. In the Spevack case, again, there were five judges for the majority and four dissenters. But as it was pointed out in the preceding argument, the fifth judge is the one that made up the majority in Spevack and Garrity and took occasion in the course of a separate opinion to refer to the fact that this court has never held, for example, that a policeman may

not be discharged for refusal in a disciplinary proceeding to testify as to his conduct as a police officer. Now, Judge Douglas, in a footnote in the Garrity case, said, "We're not passing on that question." In a previous case which we have referred to in our brief, the Stevens case, he also says he wasn't passing on it. So there's no holding by the U. S. Supreme Court, even in Garrity or Spevack, that a public contractor who is equated with a public employee may not be disciplined—if that's the word—for a refusing to furnish information to the public officials when called upon. It is the duty of this Court to follow the opinions of the Supreme Court but I submit it is not the duty of this Court to extend the opinions of the Supreme Court beyond the holdings in such cases. Neither in the Spevack case nor in the Garrity case was any statute upset. Contrary to the appellant's statement in its reply brief, and on the argument here, the Supreme Court dismissed the appeal in the Garrity case and decided the case on certiorari so the statute of New Jersey was not upset. The reason why we say that is, that the New Jersey court from which the Garrity case came, in addition to upholding the conviction of the policemen in that case, also upheld in an extensive opinion the constitutionality of the New Jersey statute with respect to them. Now in the Spevack case, which, as I said, there was no statute present, the Spevack case was simply an application by the New York court of what it considered the responsibility of an attorney as an officer of the court. In Spevack, the attorney was stripped of his license to practice law and therefore of his professional livelihood because of his invocation of the privilege.

Chief Judge Fuld: But here the corporation is stripped of its ability to get a job with the state, or the state Housing Authority.

Mr. Hirshowitz: This is different. In this case here the corporation is not stripped of its authority to run the painting business. According to our friends on the other side, they have a million dollar business. They can continue the painting business indefinitely. Moreover, as far as—

Van Voorhis, J.: Sooner or later, everybody will be working for the State and once you can't contract with the State, it puts a bad crimp in your ability to do business.

Mr. Hirshowitz: I would say there's still enough painting business around, your Honor, without respect to the State or any public official or public agency.

Van Voorhis, J.: This is a very vital part of the business of any contractor—I mean the possibility of bidding on these State jobs—

Mr. Hirshowitz: May I say that you haven't got before your Honor at present—. The part of the statute that says the contracts can be cancelled is not before this court because that's the subject of a million dollar damage action by Campbell against the Housing Authority. What's before the court is simply the question whether future bidding —and this is the same question as to whether you apply for something—you haven't got a property right there—whereas in the Spevack case, the court, in the majority opinion—

Van Voorhis, J.: Well, you do have a right to do business in a normal way, don't you? I mean there is a property right that people have to do business, isn't that so?

Mr. Hirshowitz: Yes, that's right, but you have to do business—

Scileppi, J.: You have to meet the requirements—

Mr. Hirshowitz: Yes. You have to furnish—Supposing you apply for a motor vehicle license. You have to furnish information. We had a case before this court—

Van Voorhis, J.: Yes, but this relates to future bidding. On the assumption that it may be perfectly legal, but they're bad people and so they're not allowed. I mean, that's the philosophy behind this, isn't it?

Mr. Hirshowitz: Yes. In addition, as my associate pointed out, in addition to disqualifying from future bidding, there is a section, 2603, which gives the painting company in this case the right to apply to remove the disqualification for any reason whatsoever.

Scileppi, J.: It's done as a matter of public policy, isn't it? Isn't it done as a matter of public policy, where they refuse to permit them to bid because of their method of operation?

Mr. Hirshowitz: In the Laino case, Judge Kenney points out the vital public policy that's involved on the enactment of this precautionary statute.

Van Voorhis, J.: But this is not punishing them for something that they have done, is it? It's because, on account of something that they've done, they are branded as unfit for the indefinite future, at least for five years—

Mr. Hirshowitz: That's simply—

Van Voorhis, J.: That's vastly different from punishing a person for something he had done where he may discharge his debt to society. Here you could never dis-

charge your debt to society unless you go into another business, isn't that so?

Mr. Hirshowitz: Now, assuming that the contractor has not permitted any bid rigging or collusion, there's no problem. This merely requires him to do what he has to do when he fills out an application for a license of any kind. We had a case before this Court, the Kemp case, where the applicant for a license filled out an application which showed he had been convicted previously and the question was raised as to whether the license could be refused on the basis of the statements in the application. The Supreme Court dismissed an appeal from that just at the last term. Now on this question of waiver, I just want to take a minute your Honors. We have a number of cases in our brief. This is not the question that Judge VanVoorhis suggested as to whether if you had a provision in the contract about discrimination, whether that would be binding on the person who signed the contract. This is not the question at all before this Court. The question is, if you have a constitutional right, have you got a right to waive that constitutional right? And the cases that we cite in our brief say you have a right to do that. And in the reply brief, there are a number of cases—

Van Voorhis, J.: If the statute which mandated the waiver were void, that would be decisive, wouldn't it. If the statute is valid, there's nothing to it, it's all right; if the statute is invalid then the result comes out the other way, doesn't it?

Mr. Hirshowitz: If the statute is invalid, of course that's the end of the case, but you have a middle point

here. Supposing a statute is valid, and what's really involved in this case is an argument that you couldn't coerce Campbell into waiving immunity. That's not the question of the validity of the statute. Now I just want to on this question of waiver—we cited a case—they have about five or six cases which have nothing to do with the case before you—we cited a case out of this court, the Sheppard case, a case out of the United States Supreme Court, 1946, it is an elementary rule of constitutional law that one may not retain the benefits of the act while attacking the constitutionality of one of its important conditions. I think the statute is constitutional and the rest we leave to our brief."

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